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10 **UNITED STATES DISTRICT COURT**
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
12 **OAKLAND DIVISION**

13 STATE OF CALIFORNIA, *et al.*,
14 Plaintiffs,
15 v.
16 JOSEPH R. BIDEN, JR., *et al.*,
17 Defendants.
18

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20 SIERRA CLUB, *et al.*,
21 Plaintiffs,
22 v.
23 JOSEPH R. BIDEN, JR., *et al.*,
24 Defendants.
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No. 4:19-cv-00872-HSG
No. 4:19-cv-00892-HSG
No. 4:20-cv-01494-HSG
No. 4:20-cv-01563-HSG

**NOTICE OF COMPLETION OF
BORDER WALL PLANS BY THE
DEPARTMENTS OF DEFENSE
AND HOMELAND SECURITY**

Defendants hereby notify the Court and parties that the Department of Defense (DoD) and Department of Homeland Security (DHS) have completed their plans for the redirection of funds concerning the southern border wall, as directed by Section 2 of the President's Proclamation of January 20, 2021. *See* Proclamation No. 10142, 86 Fed. Reg. 7225, 7226.

A. Department of Defense

The DoD plan is composed of two parts: (1) cancellation of border wall projects and (2) redirection of funds. *See* Memorandum for Director, Office of Management and Budget re: DoD Plan for the Redirection of Border Wall Funds (June 10, 2021) (attached as Exhibit 1) ("DoD Plan"). The first part of the plan is DoD's decision to cancel all border wall projects undertaken pursuant to 10 U.S.C. § 284 and 10 U.S.C. § 2808. *See id.* & Tab A. Defendants notified the Court and parties about that decision on April 30, 2021. *See* Action Memo re: DoD Actions Implementing Presidential Proclamation 10142 (ECF No. 307 in *Sierra Club I* and ECF No. 292 in *California I*) ("April 30 Action Memo").

The second part of the plan addresses the redirection of DoD funds. *See* DoD Plan & Tab B. As part of the decision to cancel the border wall projects, the Deputy Secretary of Defense directed that approximately \$2 billion in unobligated military construction funds made available for unawarded § 2808 contracts be released to the relevant DoD components for use on military construction projects that were deferred to fund the § 2808 projects. *See* April 30 Action Memo at 1-2 & Tab A. On June 10, 2021, the Deputy Secretary of Defense authorized a plan for the redirection of \$2.2 billion of available unobligated military construction funds to restore funding to 66 military construction projects in 11 states, 3 territories, and 16 countries. *See* Action Memo re: Plan for the Use of Funding for Projects Authorized Pursuant to Sections 284 and 2808 of Title 10, U.S. Code (June 10, 2021) (attached as Exhibit 2). The plan includes a chart listing the military construction projects that will receive restored funding. *See id.*, Tab A. All other previously deferred military construction projects will be considered for future funding; funded or built by partner countries; or cancelled due to changes in operational requirements. *Id.* at 2 & Tab E. The President's Fiscal Year 2022 Budget includes \$661 million for 16 such projects. *Id.* at 2.

DoD, however, has no mechanism to recapture funds made available for border barrier projects undertaken pursuant § 284. *Id.* at 1. As explained in the decision to cancel the border wall projects, the funds transferred for the § 284 projects were available for obligation only during the fiscal year in which they were transferred. *See* April 30 Action Memo at 2. Those funds have expired and are not available for new obligations or transfer back to the original source funds (*e.g.*, National Guard and Reserve Equipment Account). *See* DoD Plan at 1.

B. Department of Homeland Security

The DHS plan addresses DHS's appropriated border wall funds as well as funds received from the Treasury Forfeiture Fund (TFF). *See* DHS Border Wall Plan Pursuant to Presidential Proclamation 10142 (June 9, 2021) (attached as Exhibit 3). Although border barrier construction funded by DHS appropriated funds was not at issue in these cases, several aspects of the DHS plan are relevant here.

First, DHS will not undertake any new barrier construction work on the former § 284 and § 2808 projects. *Id.* at 4. Second, DHS will end border wall construction funded by the TFF and return any excess funds to the TFF. *Id.* at 5. Third, DHS will fund remediation work at the former § 284 and § 2808 projects sites that are turned over to DHS with its Fiscal Year 2021 border wall appropriation.¹ *Id.* at 4. This work may include, but is not limited to, the following:

- Completing construction of site drainage features to allow for positive drainage of the sites, ensuring no ponding, including grading sites, and installing and/or completing low water crossings and other drainage structures;
- Installing/completing permanent erosion control/slope stabilization measures to ensure constructed assets are safe and stable for their expected life cycle;
- Finishing the construction of the patrol, maintenance, and access roads to standard to ensure safe ingress/egress including guardrails and signage, and integration with existing roadways;

¹ The President's Fiscal Year 2022 budget includes no funding for border wall construction and proposes the cancellation of prior-year border wall construction balances that are unobligated when Congress passes DHS's Fiscal Year 2022 appropriation bill. *See* DHS FY22 Budget In Brief at 2, available at www.dhs.gov/sites/default/files/publications/dhs_bib_-_web_version_-_final_508.pdf.

- Remediating temporary use areas (*i.e.*, laydown yards, haul roads) and project areas impacted by construction; and
- Disposing of residual materials not required for completion of the work as identified above.

DHS Plan at 4. The specific amount of funding available for these remediation activities will depend upon the condition of the DoD projects and the amount of work DHS can undertake consistent with its Fiscal Year 2021 appropriation. *See id.*; Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, Div. F, Title II, § 210, 134 Stat. 1182 (Dec. 27, 2020).²

For DHS's future work at the project sites previously funded by § 2808, DHS intends to engage in standard environmental planning, including taking certain actions consistent with the National Environmental Policy Act and other environmental planning statutes, such as public comment on potential environmental impacts. *See* DHS Plan at 2, 4-5. DHS may forego standard environmental planning in connection with work on the former § 284 projects and rely on the waivers issued pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act where DHS must take timely action to (1) address life, safety, environmental, or other remediation requirements; or (2) settle pending litigation, including, but not limited to, actions to repair private property damaged by wall construction, remediate damage of natural, historic, or cultural resources, or avert further environmental damage or degradation due to unaddressed site conditions. *Id.*

² DHS also contemplates using its Fiscal Year 2021 border wall appropriations for other purposes, such as contingency costs and future planning. *See* DHS Plan at 3-5.

1 DATE: June 11, 2021

Respectfully submitted,

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